Nos. 79-1538 and 79-1596

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
Appellant,

v.

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., ET AL.

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., ET AL.,
Appellants,

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR

On Appeals From The United States District Court For The Western District of Virginia

BRIEF FOR THE VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., THE TOWN OF WISE VIRGINIA, AND THE COMMONWEALTH OF VIRGINIA

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Appellees' Counterstatement

The statement of the case set forth in the Secretary's brief is accurate insofar as it describes the procedural history of this case. It fails, however, to describe the factual background necessary for a full understanding of the case. Appellees believe that the factual summary set forth below will facilitate the Court's consideration of the legal issues presented.

Bituminous coal, which is Virginia's most valuable natural resource, is found in the seven westernmost counties of the State, a region of mountainous terrain with very limited level land area. The topography of much of the region is marked by steep mountain slopes with sharp ridges, massive outcrops of rock, and narrow valleys which severely limit development of the land for any economic use. Because of thin soils and steep terrain these mountain lands in their natural state are not suited for forestry operations or for agricultural use. Their value lies solely in the underlying coal seams which appear as outcroppings at various elevations on the mountain slopes. With few exceptions these coal seams cannot be recovered by underground mining for reasons related to their limited thickness, inadequate roof support provided by the overlying shale strata, and other geologic factors. Accordingly, unless they are removed by surface mining methods these valuable coal reserves, estimated as 300 million tons, are unrecoverable.

Coal mining is the major industrial activity in southwestern Virginia, and provides the economic lifeblood of the communities and people of the region. Because the economy of the region is so heavily

dependent on coal mining it is particularly affected by cyclical changes in the coal market and recurrent periods of unemployment and depression, a problem which has been a major concern of State and local officials for many years. Accordingly, State officials have recognized the urgent need for diversification of industry in order to establish a broader economic base and alternative sources of employment for the citizens of the area in the future, but such diversification is greatly inhibited by the rugged terrain conditions, and especially by the almost total lack of level land areas for industrial development, for housing and transportation facilities, and related support facilities.[1] Accordingly, a very important long range benefit to the communities in Southwestern Virginia is the potential for creating additional areas of level land by post-mining reclamation of surface mined areas. In recent years reclaimed surface mine areas have provided appropriate sites for airports, schools, hospitals, shopping centers, industrial parks and residential housing, and it has been the policy of the State Division of Mined Land Reclamation to encourage continued development of additional level land areas consistent with practical environmental considerations.

For several years prior to enactment of the Federal Surface Mining Act the Commonwealth of Virginia administered and enforced State programs regulating the use of land for surface coal mining. In 1966 the Virginia General Assembly adopted the Virginia Coal Surface Mining Law which required State approval of

[1] See testimony of Governor John N. Dalton, Tr.2798-2800; Fred W. Walker, Director, Department of Conservation and Economic Development, Tr.72-76; Congressman William C. Wampler, Tr.2468-2472.

mining plans and posting of reclamation bonds as a condition of the issuance of permits for surface mining, and in 1972 the law was amended to strengthen inspection and enforcement action by the Division of Mined Land Reclamation.[2]

In 1975 a Technical Committee was appointed to draft regulations designed to incorporate the best available surface mining technology consistent with the terrain and other geophysical conditions existing in Virginia. In developing such regulations the Technical Committee reviewed and appraised the regulations and statutes of other Appalachian coal producing States, as well as various technical engineering studies and reports prepared for federal agencies, including the Environmental Protection Agency. As a result of eighteen months of study the Virginia Reclamation Manual was adopted by the Board of Conservation and Economic Development on May 12, 1977, to become effective on September 1, 1977 as to all surface mining operations initiated after that date. (Testimony of J. Steven Griles, Tr.88-90).

Between the date of the adoption of the Virginia Reclamation Manual and its effective date of September 1, 1977, the Federal Surface Mining Control and Reclamation Act was signed into law on August 3, 1977 to become effective May 3, 1978. Because the Federal Act preempts all State laws and regulations not in conformity with the Act, the Virginia Reclamation Manual was effectively superseded by the Federal Act.[3]

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[2] Chapter 15 of Title 45, Code of Virginia.

[3] Section 504 of the Act directs the Secretary of the Interior to promulgate and enforce a federal program for any State which fails to

(footnote continues)

Although the environmental standards of the Virginia Reclamation Manual substantially parallel those of the Federal Act there is a significant difference in their approach to reclamation problems. The State regulations recognize that there are varying site-specific conditions found at any particular mining operation, and allow State authorities to approve reclamation practices which are best suited to deal with such conditions, whereas the Federal Act imposes inflexible, mandatory criteria to be applied in all situations without exception. The most critical example of this is found in section 515(d) of the Act which calls for returning all steep slope areas to approximate original contour, with all highwalls completely covered.[4] In contrast, the Virginia Reclamation Manual allows the mined area to be restored to a more level contour suitable for a better and more practical use than if restored to its original steep slope contour. This permits regrading and compaction of overburden material on the mining bench with appropriate drainage structures to prevent erosion and sediment runoff. The level area may then be used for cropland, grazing, tree farming and other agricultural uses, or, in more populated areas, for housing facilities and numerous other purposes. If restored to their approximate original contour as required by the Federal Act the steep mountain slopes have no utility for any purposes,

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(footnote continued)

adopt a State program incorporating provisions no less stringent than those contained in the Federal Act, and "[A]ny statutes or regulations of such State which are in effect to regulate surface mining and reclamation operations shall. . .be *preempted and superceded by* the Federal program." §504(g), emphasis added.

[4] The Federal Act defines a steep slope as any slope above twenty degrees. §515(d)(4).

and any economic value the land would otherwise have is virtually destroyed.[5]

The trial evidence established, and the district court found, that ninety-five percent of surface mineable coal in Virginia is situated on steep slope terrain having an average slope angle of 25 degrees. J.S. App. 96a. The Court expressly found on the basis of the extensive trial evidence that compliance with the Act's requirement for returning the steep mountain slopes of Virginia to original contour after surface mining "is economically unfeasible and physically impossible." J.S. App. 37a. The court further concluded from the expert engineering testimony that a return to original contour on steep slopes is environmentally unsound and may cause far greater environmental damage than the alternative procedures called for in the Virginia Reclamation Manual. The court specifically found that:

> "A return to approximate original contour on a steep slope increases sedimentation because of the increased erosion from the unstable mass. In addition a dangerous condition may be created by backfilling the bench. When overburden material is stacked up against the highwall the normal process of settlement of the fill material tends to pull it away from the highwall. This provides a natural channel for water from the upper slope to flow down to the bench below, creating an unstable mass with a likelihood of eventual collapse." J.S. App. 39a.

After synthesizing the cumulative effect of the trial evidence the district court found that because the Federal Act has preempted State regulation of surface

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[5] See, District Court Memorandum Opinion, J.S. App.56a.

mining "the State has lost control over the economic development that could take place in southwest Virginia," and "is now in the position of enforcing an Act so particularly unsuited to its terrain that compliance with its provisions has a higher potential for environmental harm than alternative procedures." J.S. App. 36a, 39a.[6] For these reasons the court concluded that the Act operates to "displace the States' freedom to structure integral operations in areas of traditional governmental functions, *National League of Cities* v. *Usery,* 426 U.S. at 852, and, therefore, is in contravention of the Tenth Amendment." J.S. App. 39a-40a.

The district court further found, on the basis of the trial evidence, that

> "The requirement of return to original contour amounts to a physical restriction on the removal of coal. The landowner cannot remove his coal because it is economically and physically impossible to comply with the steep slope reclamation provisions of the Act. Because of the nature of the land, the owner is thereby deprived of any use of his land, not only the most profitable use. Mountainous terrain is unusable for all income producing activities unless it is level, which the Act is aimed at preventing." J.S. App. 55a, 56a.

The court noted further that "The fact that property owners are being deprived of the use of their land by a statute that does not accomplish its purpose, nay, may even run contrary to it, tips the balance toward finding a taking." Accordingly, the court held

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[6] Citing studies sponsored by federal government agencies, including the EPA and the Bureau of Mines. J.S. App.39a, n.17.

that the Act's requirement that steep slopes be restored to approximate original contour constitutes a taking of property without just compensation in violation of the Fifth Amendment. J.S. App. 56a.

The district court also determined that the provisions of section 521 of the Federal Act which empower federal inspectors to summarily order cessation of mining operations without a prior hearing or showing of proper cause create a grave potential for abuse, and give rise to violations of the procedural due process guarantees of the Fifth Amendment. In support of this conclusion the court cited a number of examples, developed through evidence at the trial, where OSM inspectors issued unjustified and unwarranted cessation orders which were subsequently vacated after formal hearings on grounds that they were improperly issued. During the time such invalid cessation orders remained in effect the mine operators lost thousands of tons of coal, hundreds of miners were out of work, and the operators were compelled to incur great expense in engineering and attorney's fees in appealing the cessation orders.

Similarly, the court held that the civil penalty provisions of section 518 do not accord with due process because they call for mandatory assessment of penalties by the Secretary against a mine operator in amounts up to $150,000 without a hearing of any kind, and provide that unless an operator pays the assessed penalty, prior to any hearing, he waives all

legal rights to contest the alleged violation or penalty amount. J.S. App. 68a, 69a.[7]

In light of these findings the court enjoined the issuance of summary cessation orders under section 521, and civil penalties under section 518, until such time as adequate due process guarantees are afforded to mine operators. J.S. App. 73a, 74a.

SUMMARY OF ARGUMENT

Title V of the Surface Mining Act creates a preemptive program of federal regulatory controls affecting land use and land reclamation, and thrusts the federal government for the first time into a sphere of regulatory activity which has heretofore been regarded as exclusively within the jurisdiction of the States and their political subdivisions. By imposing federal controls upon land use for surface mining, and dictating criteria for reclamation of land areas after mining has ceased, the Act transfers to a federal agency the time-honored land use powers of State and local governments and creates a body of federal police powers designed to supplant the inherent police powers of the States to provide for the protection of the individual citizen in his person as well as in his property rights.

This in turn raises a serious constitutional question as to whether the power granted to Congress under the Commerce Clause extends to regulation of

[7] Section 518(c) provides that if a person wishes to contest either the amount of a penalty or the fact of the alleged violation he must first forward the penalty amount to the Secretary for placement in an escrow account, and "Failure to forward the money to the Secretary within thirty days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty."

private non-federal lands within a State. The prior decisions of this Court indicate that it does not, and there are no legal precedents to support exercise of federal powers in this field.

In addition, serious questions are presented as to whether the means selected by Congress in this instance are appropriately designed to achieve the legislative objective of protecting the quality of land resources and preventing environmental damage. The overwhelming weight of the trial evidence supports the district court's finding that the Act's requirement for restoring steep slope mountain terrain to approximate original contour is environmentally unsound, and prevents reclamation of unproductive mountain slope land to a higher level of productive use compatible with the needs of the local communities and their people.

Because it denies to a State the discretionary authority to determine the best and highest use of its lands, and the orderly development of its natural resources, Title V unconstitutionally intrudes upon sovereign powers reserved to the States under the Tenth Amendment. Existing environmental protection programs under the Clean Air Act and the Water Pollution Control Act are fully capable of achieving the desired objectives without the excessive intrusion upon State land use functions brought about by the Surface Mining Act.

The district court correctly held that because the inflexible requirements of Title V as applied to mining on steep mountain terrain amount to a physical restriction on removal of coal, with a consequent destruction of the economic value of the land, the Act effectuates a

taking of property without just compensation in violation of the Fifth Amendment.

The trial court also correctly concluded that summary issuance of cessation orders by federal mine inspectors without a hearing or showing of proper cause, and the issuance of civil penalty assessments under the procedures sanctioned by the Act, result in a denial of procedural due process contrary to the guarantees of the Fifth Amendment.

ARGUMENT

I

BECAUSE TITLE V OF THE FEDERAL ACT PURPORTS TO REGULATE, UNDER THE GUISE OF THE COMMERCE CLAUSE, LAND USE FUNCTIONS WITHIN THE RECOGNIZED SCOPE OF THE POLICE POWERS OF THE COMMONWEALTH OF VIRGINIA, IT INVOLVES AN UNCONSTITUTIONAL ASSUMPTION OF AUTHORITY NOT GRANTED TO THE FEDERAL GOVERNMENT

In considering the question of whether Title V of the Act represents a valid exercise of the powers of Congress under the Commerce Clause the district court concluded that it must defer to the congressional finding in section 101(f) of the Act that surface coal mining has adverse effects on commerce, and that "A court may neither examine the motive or purpose behind the legislation, *United States* v. *Darby,* 312 U.S. 100, 115 (1941), nor substitute its own judgement for that of the Congress."

Appellees acknowledge that the district court correctly stated the rule laid down by this Court in the cited cases, but contend that the rule is not applicable where, as here, the subject of attempted federal regulation is by its very nature beyond the scope of the commerce power. At the heart of this case is the question of whether land *as such* is subject to regulation under the Commerce Clause, i.e. whether land can be regarded as "in commerce." As appellees will show, the principal focus and thrust of the Federal Surface Mining Act is regulation of the use of private non-federal lands within the borders of the respective States, and has little or nothing to do with the commerce aspects of extraction, transportation and sale of surface mined coal. As early as 1972 when the Senate was considering S.630, the Department of the Interior advised its sponsor, Senator Jackson, that "The environmental problems stemming from mining operations are essentially land use problems. Such problems are, under the Federal Constitution, primarily the responsibility of the States." [8] S.425 which was passed in the 93rd Congress was also sponsored by Senator Jackson who commented on the Senate floor that:

> "Surface mining is a form of land use and its regulation and control must be considered within the context of the broad demands and competing requirements upon the State's land resources. In a constitutional sense, the primary authority and responsibility for the control of surface mining resides in the State." [9]

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[8] S.Rept. 92-1162, 92d Cong., 2d Session, p.62.

[9] Cong. Rec. January 18, 1973, p.S.834.

Despite this acknowledgement that the surface mining legislation involved regulation of land use, and that constitutional authority for control of surface mining resides in the States, Congress proceeded to adopt the Act as a comprehensive scheme of federal controls preempting State power to permit land use for surface coal mining in any manner other than as dictated by the federal government.

Although the power of the federal government to adopt and enforce environmental laws dealing with air and water resources [10] has been recognized as a valid exercise of the commerce power, (cf. cases cited *infra*), it does not follow that a parallel case can be made for federal regulation of private land. Air is an element common to all States, and its contamination within a State can have effects beyond that State's borders in what has been termed a "spillover effect." [11] On similar grounds, there is a demonstrable federal interest in the environmental protection of navigable waters and their tributaries. But no comparable grounds exist for the assertion of a federal interest sufficient to justify the regulation of private lands, *as land,* within a State. Hence, in the Surface Mining Act Congress has assumed the authority, without a rational basis under the Commerce Clause, to impose federal environmental standards on private lands so as to restrict their use for surface coal mining.

The Secretary's argument (Brief, p.24) that the regulatory scheme of Title V is primarily concerned

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[10] The Clean Air Act, 42 USC 1857 et seq., The Federal Water Pollution Control Act 33 USC 1251 et seq.

[11] See, *Stewart*, Pyramids of Sacrifice; Problems of Federalism in Mandating State Implementation of National Environmental Policy; 86 Yale Law Journal 1196 (1977).

with "operations involved in extraction of surface mined coal," rather than control of land use, is deceptive and misleading, and is contrary to the express finding of the district court. The court found that the direct regulatory impact of Title V is upon land use, and "While the Act ultimately affects the coal mine operator, its pervasive effect is on the States' legislative authority and on State control of land within its boundaries." J.S. App. 32a.

Although the Secretary now contends that the Act does not regulate land, this contention is directly at odds with the position the Interior Department and its officials have heretofore taken. For example, in *The Land Use Restoration Provisions of the Surface Mining Control and Reclamation Act: Constitutional Considerations*,[12] the Associate Solicitor for the Office of Surface Mining has unabashedly described the Act as establishing land use controls. William M. Eichbaum, in collaboration with David T. Buente, an attorney in the Division of Lands and Natural Resources, Department of Justice, discusses the regulatory scheme of the Act and describes the steps the Office of Surface Mining has taken to implement its "land-use control standards." *Id.* 229. The authors note that in the interim phase OSM established criteria for assessing pre-mining use of the land, which "defined eleven separate 'land-use' categories," *Id.* 229,230, and that "the permanent program includes complex permitting requirements that relate to land-use-control." *Id.* 233. See also, fn. 8, supra.

An examination of Title V proves beyond doubt that its objective is to dictate the conditions under

[12] 4 Harvard Environmental Law Review 227 (1980)

which a State may authorize the use of lands for surface mining, and the procedures and land use criteria which a State must apply in considering and approving applications for permits. §§ 506, 507. Under its terms a State cannot issue a permit for any land use for coal surface mining without first acquiring data on the history of the land use which preceded the proposed mining, the capability of the land prior to mining to support a variety of uses, the productivity of the land prior to mining, the use which is proposed to be made of the land following reclamation, the capacity of the post-mining reclaimed land to support a variety of alternate uses and the relationship of such uses to existing land use policies and plans, the manner in which proposed post-mining land use is to be achieved, and the necessary support activities which may be required to achieve the post-mining land use. § 508. A State must also require a performance bond in an amount sufficient to assure post-mining reclamation of the land to approximate original contour, and assure compliance with proposed post-mining land use. § 509. Other provisions of Title V prohibit surface coal mining on various categories of lands, and require that a State desiring to retain any enforcement authority under the Act must establish a planning process for designating additional land areas as unsuitable for mining in accordance with the specified criteria of the Act. § 522.

After reviewing these preemptive restrictions on the authority of the States to permit use of lands for surface coal mining the district court correctly found that the Act's "pervasive effect is upon the States' legislative authority and on State control of land use within its boundaries." J.S. App. 32a.

A. Diminution of the Utility of Land as a Basis for Federal Commerce Regulation.

The predicate for the regulatory scheme of the Act is contained in the finding in section 101(c) that surface mining affects commerce, *inter alia,* by "diminishing the utility of land for commercial, industrial, residential, recreational, agricultural and forestry purposes . . . ." The overwhelming weight of the trial evidence in this case proves, however, that surface coal mining *enhances* rather than *diminishes* the utility of Virginia's mountain slope land for commercial, industrial, residential, agricultural and forestry purposes. In its Memorandum Opinion the district court enumerated the various purposes for which mined lands have been and can be used when reclaimed to a level state, and the high premium placed on the value of such level lands. If restored to original contour, the court found, mountain slope land has no practical economic value or use. J.S. App.37a.[13]

The Secretary nevertheless insists that the courts must defer to Congress' finding and "the only remaining question for judicial consideration is whether the means selected by Congress for the regulation of commerce are rational." Brief, p.24, citing *Katzenbach* v. *McClung,* 379 U.S. 294 (1964). This argument again sidesteps the real issue of whether regulation of land is regulation of commerce. If Congress has no

[13] The court relied on evidence that steep slope land without coal has only a nominal value of five dollars to seventy-five dollars an acre, but coal lands which are left in a level state after mining are worth a minimum of five thousand dollars an acre, and some reclaimed lands may bring as much as three hundred thousand dollars an acre. The court noted that "If restored to its original contour, its worth reverts to the lower values." Id.

power to regulate non-federal lands within a State it cannot create that power simply by making a finding that the use of such lands adversely affects interstate commerce.

It would seem obvious that the rule of deference to Congressional findings cannot foreclose scrutiny into the premise on which such findings are based. If a finding that diminution of the utility of land is sufficient grounds for exercise of the commerce power in the Surface Mining Act it follows that Congress can bring any and all land use activities within the regulatory control of the federal government by a similar "finding."[14]

Although the Secretary's brief is generously flavored with citations to commerce clause cases ranging from *Gibbons* v. *Ogden,* 9 Wheat. 1 (1824) to *Heart of Atlanta Motel* v. *United States,* 379 U.S. 241 (1964), it is important to note that none of the cited cases deal with the question of whether the federal commerce power extends to regulation of non-federal lands within the borders of the individual States.

The actual fact is that this Court has never held, nor even intimated, that land as such is subject to regulation under the Commerce Clause. Indeed, in the relatively few cases in which the issue has been even touched upon the Court unequivocally rejected this notion. As long ago as 1877 the Court noted in

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[14] As one commentator puts it "The Act relies upon what can be called the 'hocus pocus' theory of federal power by incantations in the form of conclusory generalizations of effects upon commerce, as if this magically creates a general federal police power." *Engdahl,* Some Observations on State and Federal Control of Natural Resources, 15 Houston Law Review 1201, 1218.

straightforward language that *"Commerce has nothing to do with land while producing, but only with the product after it has become the subject of trade."* *McCready* v. *Virginia,* 94 U.S. 391, 396. Emphasis added. The cases since *McCready* provide no support for any contrary conclusion, and the quoted language from *McCready* continues to be cited by the courts as controlling law. See, e.g., *Moore* v. *Hampton Roads Sanitation Commission,* 577 F.2d 1030, 1038 (4th Cir. 1977).

Although in the intervening years since *McCready* the federal commerce power has been broadly construed to cover local activities affecting commerce, it has never been extended to land use regulation, and the courts have uniformly held that federal powers in respect to regulating land are limited to those derived from the Property Clause of Article 4, Section 3, Clause 2 of the Constitution, i.e. legislative powers over federally owned land.[15] In *Kansas* v. *Colorado,* 206 U.S. 46 (1906), the State of Kansas sought to restrain Colorado from diverting the waters of the Arkansas River for reclamation of arid lands within Colorado. The United States intervened in the action asserting that the right of either Colorado or Kansas to appropriate the waters of the river for reclamation purposes was subject to the superior authority and supervisory control of the United States to control the whole system of reclamation of arid lands. The Court noted that the issue raised by the government's

[15] "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be construed as to Prejudice any Claims of the United States, or of any particular State."

claim"... involves the question whether the reclamation of arid lands is one of the powers granted to the general government," and went on to hold that the only authority of the federal government to deal with reclamation of land derives from the Property Clause, which

> "... does not grant to Congress any legislative control over the states, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits....The proposition that there are legislative powers affecting the nation as a whole which belong to, although not expressed in, the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers ... This natural construction of the original body of the Constitution is made absolutely certain by the 10th Amendment. This Amendment, which was seemingly adopted with prescience of just such a contention as the present, disclosed the widespread fear that the national government might under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted." 206 U.S. at 87-89.

The Court held, accordingly, that the respective rights of the States of Kansas and Colorado were not subordinate to any supposed superior right on the part of the federal government to provide for reclamation of lands, other than federal lands, within the States.

The principles expressed by the Court in *Kansas* v. *Colorado* have been followed in subsequent decisions, and remain the applicable law to the present time. In *United States* v. *Arizona,* 295 U.S. 174

(1935), the Court held that the federal reclamation laws providing for irrigation of arid lands did not involve an exercise of the commerce power, "but in the exertion of power granted by Article 4, section 3, clause 2." 295 U.S. at 184. A similar view was expressed by the Court in *Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275 (1958) involving federal reclamation projects in California.

In *Federal Power Commission* v. *Oregon,* 349 U.S. 435 (1955) the State of Oregon sought to set aside a license issued by the FPC for a power project to use non-navigable waters located on a federal reservation in Oregon. The question presented was whether the State had exclusive control over the use of non-navigable waters within the State. The Court noted that the authority of the FPC to issue licenses in relation to navigable waters springs from the Commerce Clause, and that where non-navigable waters are involved the Commission's authority to issue licenses hinges upon whether the project is located on federally owned lands and reservations. The Court held that since in the case before it the power project, and the non-navigable stream, were located on a federal reservation the FPC had authority under the Property Clause of the Constitution to issue the license. The clear implication of the Court's holding is that had the project been located on private or state owned lands the federal agency would have no regulatory powers respecting it.

Kleppe v. *New Mexico,* 426 U.S. 529 (1976), involved the constitutionality of a statute enacted by Congress in 1971 to protect wild horses and burros on public lands of the United States. The State of New

Mexico asserted that the federal government lacked power to legislate with respect to wild animals unless the animals were moving in interstate commerce or damaging the public lands, and that the State alone had authority in respect to control of these animals. A three-judge federal court agreed with the State that the Act could not be sustained under the Commerce Clause, but upon appeal this Court upheld the Act on grounds that under the Property Clause the federal government has power over its own property analogous to the police power of the several states, and can properly regulate to protect the wildlife living there. At the same time, the Court noted, the Property Clause does not authorize "an exercise of a general control over public policy in a State," but only "an exercise of the complete power which Congress has over particular public property entrusted to it" 426 U.S. at 540, citing *United States* v. *San Francisco,* 310 U.S. 19, 84 L.Ed. 1050 (1940).

The common legal premise in all of the cited cases is that the enumerated powers of the federal government under Article I of the Constitution do not include regulation of lands other than federal lands, and there is no judicial authority or precedent for the Secretary's contention that shipment of extractive minerals in interstate commerce gives rise to federal regulatory powers to dictate to the States how private lands within their jurisdiction may be used.

B. Floods and Water Pollution

The alternative ground upon which the Secretary defends the preemptive scheme of the Act is that Congress found in section 101(c) that surface mining adversely affects commerce by contributing to floods

and water pollution. The apparent rationale for this argument is that because federal commerce jurisdiction includes navigable waters it must also include jurisdiction over any watershed areas from which rainwater runoff flows into navigable waters or their tributaries.[16]

If this premise is carried to its logical conclusion there must be deemed to be a federal commerce interest in every square foot of land which receives rainfall or storm precipitation. In such a context there could be no limits whatever to the federal commerce power, and State control of land use would for all practical purposes be a dead letter.

While it is unquestioned that the federal commerce power extends to maintaining and improving the navigable waters of the United States, and preventing obstructions to navigation, federal jurisdiction over navigable waters does not carry with it the power to regulate lands which drain into navigable waters. "This power to regulate navigation confers upon the United States a dominant servitude which extends to the entire stream and the stream bed below the ordinary high water mark . . . *but does not extend beyond the high water mark.*" *United States* v. *Rands*, 389 U.S. 121, 123 (1967), emphasis added.

Construction of flood control dams and structures is carried out under the Flood Control Act of 1944, 33 USC 701, which expressly states in its Declaration of Policy (section 701-1) that

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[16] The evidence presented at the trial showed that surface coal mining in Virginia has a minimal effect on stream sedimentation, and that mining on steep slopes has the effect of interrupting and holding heavy flows of rainwater which would otherwise increase flooding in the valleys below. See district court Memorandum Opinion, J.S. App.26a, n.1.

> "In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, for navigation or flood control, as herein authorised, it is hereby declared to be the policy of the Congress to recognize *the interests and rights of the States in determining the development of the watersheds within their borders* and likewise their interests and rights in water utilization and control . . . ." Emphasis added.

In addition to the flood control activities authorized under the Flood Control Act, the Federal Water Pollution Control Act directs the Environmental Protection Agency to establish, in cooperation with the States, programs for reducing or eliminating pollution and improving the sanitary condition of surface and underground waters. These programs deal separately with "point source pollution," i.e. the effluent from any discrete conveyance, pipe, ditch, channel, conduit or any vessel or floating craft, and "non-point source pollution" resulting primarily from rainwater and stormwater runoff of land areas.

In respect to point source pollution, the EPA has authority to establish effluent limitations for discharges into navigable waters, and to authorize the States to issue licenses and permits under the National Pollutant Discharge Elimination System (NPDES) provided for in title IV of the Act. Pursuant to the provisions of such title the Commonwealth of Virginia has established and carried out NPDES programs which have received full approval of the EPA.

Non-point source pollution is dealt with under section 208 of the Federal Water Pollution Control

Act, which calls for the Governor of each State to designate an organization capable of developing effective areawide water management plans for any problem areas. Pursuant to this section the Governor of Virginia in 1974 designated the Southwest Virginia Section 208 Planning Agency to make a comprehensive survey and prepare a study of water control problems in the seven southwestern Virginia counties comprising the coal producing region of the State.[17] Participating in the Study were the Virginia State Water Control Board, the Virginia Department of Conservation and Economic Development, various local governmental agencies, the Virginia Division of Mined Land Reclamation, the U.S. Soil Conservation Service, the Environmental Protection Agency, and various citizens advisory groups.

Based upon the data developed by the Section 208 Planning Agency over a period of four years it was found that agriculture is the major source of pollution and sedimentation of area streams in southwestern Virginia, and that "up to 75 percent of the suspended solids can be eliminated in many large streams by controlling erosion from agricultural lands." Operator's Ex.1, 373. See also, Memorandum Opinion of the district court, J.S. App. 16a, n.1.

From the foregoing discussion two principal points can be drawn. First, the statutes enacted by Congress dealing with exercise of federal regulatory powers over waters of the United States do not purport to give the government jurisdiction over the upland areas comprising the watersheds which drain into

[17] The results of this survey, together with the findings of the Study, were introduced in evidence at the trial as Operator's Exhibit 1.

navigable streams and their tributaries. Second, the federal interest in preventing water pollution has been provided for through various programs and enforcement actions authorized under the Federal Water Pollution Control Act Amendments of 1972 without resorting to the drastic land use regulation scheme of the Federal Surface Mining Act.

II

THE DISTRICT COURT CORRECTLY HELD THAT TITLE V OF THE FEDERAL SURFACE MINING ACT PREEMPTS RESERVED POWERS OF THE STATES IN CONTRAVENTION OF THE TENTH AMENDMENT

Assuming *arguendo* that there exists a federal commerce interest in private land use, the question remains as to whether the commerce power justifies federal preemption of the historic reserved powers of the States in this field, or whether the method of regulation selected by Congress constitutes a "drastic invasion of State sovereignty where less intrusive approaches are available." *District of Columbia* v. *Train,* discussed infra.

A. The Act Displaces Virginia's Freedom to Structure Integral Operations in Areas of Traditional Governmental Functions

As noted in *National League of Cities* v. *Usery,* 426 U.S. 833 (1976), "the test in judging whether federal regulation is constitutionally permissible is whether it interferes with a State's *"freedom* to structure *integral operations* in areas of *traditional governmental functions."* 426 U.S. at 852. In establishing

such a test, the Court recognized that "[T]here are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from expressing the authority in that manner." 426 U.S. at 845. As one author has expressed it: "Expanded use of federal authority to control the environmental consequence of land use decisions is ultimately subject to the limitation upon congressional power posed by the role of the states as sovereign entities within a federal system of government."[18]

These concepts were previously considered in *District of Columbia* v. *Train,* 521 F.2d 971 (1975), vacated and remanded on other grounds, *sub nom EPA* v. *Brown,* 431 U.S. 99. The Commonwealth of Virginia, together with the State of Maryland and the District of Columbia, contended in that case that EPA regulations requiring State and local governments to enforce vehicle exhaust emission standards, and other EPA air quality control requirements under the Clean Air Act, were in violation of the principles of federalism embodied in the Tenth Amendment. The Court of Appeals for the District of Columbia held that although the Clean Air Act was a valid exercise of the power of Congress to regulate interstate commerce, the EPA enforcement activities improperly infringed upon State sovereignty. As stated by the court:

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[18] Note, *Zoning, Environmental Land Use Regulation,* 91 Harvard Law Review 1427, 1610. (1978) [discussing *National League of Cities* v. *Usery, supra*]

> "It would thus appear that the extent of federal intrusion into state sovereignty is of some relevance even where the federal regulations are an exercise of the commerce power. Since the Tenth Amendment was described in *Fry* [*Fry v. United States,* 421 U.S. 542 (1975)] as declaring 'the constitutional policy that Congress may not exercise power *in a fashion* that impairs the States' integrity or their ability to function in a federal system,' the restrictions may be directed to the manner in which the federal government exercises its commerce power. . .A federal regulation which *compels* the states to enforce federal regulatory programs clearly 'impairs the States' integrity' and 'their ability to function in a federal system.' The Tenth Amendment thus provides an additional ground for striking down these particular regulations." 521 F.2d at 994. (emphasis original).

Similarly, in *Brown* v. *EPA,* 521 F.2d 827 (9th Cir. 1975), vacated and remanded for consideration of mootness, 431 U.S. 99 (1977), another case arising under the Clean Air Act and the EPA regulations, the Ninth Circuit Court of Appeals expressed deep concern over a construction of the commerce clause which "would reduce the states to puppets of a ventriloquist Congress." 521 F.2d at 839.

In *Friends of the Earth* v. *Carey,* 552 F.2d 25 (2nd Cir. 1977) the Court of Appeals noted:

> "In determining whether an otherwise valid exercise of the federal commerce power would impermissibly impair state sovereignty we are therefore required to balance the reason for the

> exercise against the extent of the usurpation of state policy-making or invasion of integral state functions that would result, giving 'inappropriate recognition to the legitimate concerns of each government.' " 552 F.2d at 37.

In summary, the Court must balance the interests of federal and state sovereignty in ruling upon the constitutionality of the Act. Under the federal scheme,"neither government may destroy the other nor control in any substantial manner the exercise of its power." *National League of Cities,* 426 at 844, citing *Metcalf & Eddy* v. *Mitchell,* 269 U.S. 514 (1926). As discussed below, the Act deprives states of discretionary authority over land use planning and thus impermissibly intrudes upon an integral and traditional function of state government.

1. The Act Impermissibly Removes State Discretionary Authority Over Land Use Planning and Control of Surface Mining

In *Sierra Club* v. *EPA,* 540 F.2d 1114 (D.C. Cir. 1976), cert. den. 430 U.S. 959, the Court of Appeals observed that the Tenth Amendment is not infringed if "the states retain broad discretion under the regulations to control the use of their land in the scope of their economic development." 540 F.2d at 1140.

In the case at hand the district court found that "The evidence presented to this court clearly shows that the Commonwealth of Virginia does not retain broad discretion under the regulatory scheme devised by Congress to control economic development of the land in southwest Virginia, nor does it retain the power to make choices as to essential decisions regarding that land." J.A. App.35a. The court went on to state that:

> "The provision requiring 'return to approximate original contour' for all operations, regardless of the conditions, is the most intrusive practical aspect of the Act ... Virginia is particularly affected by this legislation because ninety-five percent of its strippable reserves are located on slopes in excess of twenty degrees, and, therefore, the approximate original contour provision comes into play with regard to almost all of the state's coal reserves." J.S. App.35a, 36a.

Because there is a great need for level land in southwest Virginia, the court noted, leaving the land in a level state instead of restoring it to approximate original contour would allow it to be used for a variety of purposes important to the economic development of the region. The court accordingly concluded that:

> "In enforcing this requirement the State has lost control over the economic development that could take place in southwest Virginia. The Commonwealth is deprived of its right to dictate whether this land could be better used for some other purpose." J.S. App.36a.

The Secretary argues (Brief pp. 30,31) that *National League of Cities* is not applicable here because the "regulation of surface coal mining is not the kind of 'integral governmental function' protected by the Tenth Amendment."

The district court dealt directly with this contention, and on the basis of the trial record concluded that the Federal Act has a significant impact on integral State functions "[T]hrough forced relinquishment of State control of land use planning; through loss of State control of its economy; and through

economic harm, from destruction of the taxing power of certain counties, cities and towns." Because of this, the court found, "The Act has substantially restructured traditional ways in which the local governments have arranged their affairs." J.S. App.40a; *National League of Cities,* 426 U.S. at 849.

2. The Act Displaces State Policy Regarding Land Use Planning and Control Which Has Traditionally Been A Function Of State And Local Government.

Neither the holding of *National League of Cities* nor the range of "integral" functions can be confined to decisions involving wages and hours of State and municipal employees, or police and fire protection activities of local governments. If this is all that is left of State sovereignty then the Tenth Amendment is indeed a dead letter. The district court more correctly construed State land use regulation as being "an integral portion of those governmental services which the States and their political subdivisions have traditionally afforded their citizens," citing *National League of Cities,* 426 U.S. at 855, and noted that "A state is its citizens and protection of their land is as vital an activity as any of the other enumerated services." J.S. App. 34a.

For more than 200 years regulation of land use has been exercised exclusively by the States. *City of Euclid* v. *Ambler Realty Co.,* 272 U.S. 365; *Berman* v. *Parker,* 348 U.S. 26 (1954); *Village of Belle Terre* v. *Boraas,* 416 U.S. 1 (1974). As noted by this Court in *Warth* v. *Seldin,* 422 U.S. 490, 508 N.18 (1975), "Zoning laws and their provisions, long considered essential to urban planning, are peculiarly within the

province of the State and local legislative authorities." The federal government has not, prior to this Act, claimed any supervening authority in this area. The Act thus raises a critical question as to whether Congress can effectively amend the Constitution, and accomplish a transfer of these historically reserved State powers to a federal agency in Washington, by the simple expedient of making a legislative finding that use of land for surface coal mining adversely affects interstate commerce.

It seems reasonable to infer that land use regulation is typical of those activities "performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services." *See National League of Cities,* 426 U.S. at 851.

The Secretary responds to the district court's findings of displacement of integral state functions with the misleading and inaccurate assertion that "[t]he variance procedures in § 515 add flexibility to the 'approximate original contour' rule and ensure that, in appropriate circumstances and with adequate environmental safeguards, mine operators and land owners will be permitted to create usable flat land on steep slopes, if that is needed for an 'equal or better economic or public use' after mining is completed." (Brief p. 35). It is astounding that the Secretary would attempt to mislead the Court in this manner, since the variance language of § 515(e) is conditioned by the proviso that "complete backfilling with spoil material shall be required to cover completely the highwall which material will maintain stability following mining and reclamation."

The district court considered this very point, and noted that the Secretary's own comments published with his proposed regulations admitted that the requirement for completely covering the highwall renders the variance provision of little use on steep slopes. 44 Fed. Reg. 61313, October 4, 1979. The court added that "For all practical purposes, the backfilling stipulation destroys the usefulness of a variance since the highwall must still be covered." J.S. App. 36a, n.9. *See also,* J.S. App. 37a, n.10; J.S. App. 45a.

An identical conclusion has been reached by the board to which the Secretary has delegated his functions of deciding disputes arising under the Act. In *Tollage Creek Elkhorn Mining Co.,* IBSMA 80-32, November 24, 1980, the Interior Board of Surface Mining Appeals considered a notice of violation charging Tollage Creek with failure to restore the land to approximate original contour. The owner of the surface area planned to use the land for a tree farm after mining was completed, and prior to mining obtained a permit from the State of Kentucky allowing a variance for this purpose. Despite the State variance permit the Board upheld the charged violation because the highwall was not completely covered. In so doing, however, the Board noted that

> "It is with difficulty that we have reached the result in this case. Common sense and fairness would appear to require an opposite result. The Federal law seems inescapable, however. Had Congress been presented with the factual situation here, where elimination of the highwall would not benefit the environment but only burden the operator or landowner, it may have provided in the Act for some exception to the rigid

backfilling requirements. Apparently, it was not. Clearly it did not."

In the context of the foregoing discussion it is evident that the Act does constitute a drastic intrusion of federal authority in an area previously considered the exclusive domain of sovereign States. Further even if the Act does not *compel* Virginia to regulate mining by its express terms, the Act clearly displaces existing land use statutes peculiarly applicable to mining in Virginia with national standards proved to be impracticable in application to the State's terrain.

B. Less Intrusive Approaches Are Available for Dealing With The Environmental Effects of Surface Coal Mining

Under the principle established in *Fry* v. *United States,* discussed *ante,* even a drastic invasion of state sovereignty may be constitutional where less intrusive approaches are unavailable. 421 U.S. at 542. In the instant case the Court must continue to employ a balancing approach in determining whether there exist less intrusive measures available to Congress which would produce the same or similar results while preserving the sovereignty of the State in matters of land use control.

As has been seen, there are currently in effect various federal programs for dealing with air and water quality under the Clean Air Act and the Federal Water Pollution Control Act of 1972. The federal regulations adopted under these statutes apply with equal force to the surface coal mining industry as to all other industries. Any atmospheric pollution generated as a result of surface coal mining is subject to all enforcement powers and sanctions administered by

the Environmental Protection Agency under the Clean Air Act. All mining operations, both surface and underground, are currently required to comply with the pollution control programs adopted pursuant to the Federal Water Pollution Control Act. The basic requirement of this latter program is that no effluents may be discharged from any "point source" into streams which ultimately lead into navigable waterways except pursuant to the terms of an NPDES permit. Persons responsible for failure to comply with permit requirements may be fined up to $10,000 per day under EPA administrative procedures, and wilfull violations are subject to criminal provisions authorizing fines of not less than $2,500 and not more than $25,000 per day of violation, and one year of imprisonment for the first offense.[19]

It is thus evident that prior to enactment of the Federal Surface Mining Control and Reclamation Act there were in effect federal and state programs establishing strict environmental safeguards for air and water contamination associated with or incidental to surface coal mining. Appellees submit that these regulatory programs, which are designed to vindicate the federal interest in clean air and water, represent the acceptable limits of federal intrusion upon the historic police powers of the States in the area of public safety and welfare. Because the federal interest can be and has been effectively dealt with under the existing programs, the wholesale preemption of State police powers under the Federal Act constitutes a "drastic

[19] 33 U.S.C. 1319.

invasion of state sovereignty where less intrusive approaches are available." *Train, supra.*[20]

C. The Court Should Balance Competing Federal, State and Private Interests in Construing the Act

Justice Blackmun interpreted *National League of Cities* v. *Usery* to have adopted a "balancing approach" in assessing the constitutionality of a federal act which encroaches upon rights reserved to states under the Tenth Amendment. 426 U.S. at 856. *See also Friends of the Earth* v. *Carey,* 552 F.2d 25, 37 (2d Cir. 1977). In certain areas, such as environmental protection, Justice Blackmun considered the federal interest to be "demonstrably greater" and state facility compliance with imposed federal standards to be essential. 426 U.S. at 856. The present challenge to the Act under the Tenth Amendment cannot be dismissed, however, by simply categorizing it as an "environmental case." That which is regulated under the Act here is not air or water, which may have measurable affects upon the nation as a whole. Rather, it is *land as land* that is subjected to federal control by the Act. The Secretary attempts to avoid the obvious by suggesting that the Act merely regulates surface mining. As previously noted, however, the Act and implementing regulations have been described by the former Associate Solicitor for the Division of Surface Mining as forming "a land-use regulatory scheme that is national, uniform and mandatory." [21]

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[20] Appellees in no way suggest that protection of air and water are beyond the reach of federal regulatory powers. See discussion p. 13 *ante.*

[21] 4 Harv. Envir. L. Rev. at 235; cited at note 12, *ante.*

Viewed in this light, the case cannot be determined by reference to those cases considering congressional enactment of laws "regulating individual business necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside." 426 U.S. at 845. Regulation of mining or mine safety or environmental factors, all of which have been held to be valid exercises of federal power, is not the basic impact of this Act. Rather, the federal government now seeks not merely to regulate but to *plan* for land use in all States and localities.

Under the balancing test the federal interest must be "demonstrably greater" than the interest of the State, and for the reasons stated below it is submitted that federal interest in land use planning *per se* is not demonstrably greater than that of states.

1. Land Is A Unique Commodity Not Readily Susceptible to Uniform, Nationwide Planning or Regulation.

Prior to the Act federal efforts to impose nationwide land resources regulation have, with few exceptions, taken the form of financial incentives to states and localities to implement regulations. *See Note,* 4 Harv. Envir. L. Rev. at 239-40 fn. 68-74. That Congress has not previously sought to impose "nationwide, uniform and mandatory" land use requirements undoubtedly reflects recognition of the uniqueness of each parcel of land. It is hornbook law that land is unique. Land traditionally has been subject to the equity jurisdiction of the courts so as to provide flexibility and avoid harsh results that might obtain if considered under rigid rules of law. IV Pomeroy's *Equity Jurisprudence* § 1402, p. 1034, 2 Story, Equity

Jurisprudence §§ 829-843, 993. Rigid applications of uniform laws or regulations frequently lead to irrational results as evidenced by the trial court's findings.

For instance, a very great part of the trial evidence dealt with the question of whether restoring steep mountain slopes to approximate original contour is an environmentally sound practice. The expert witnesses were in general agreement that the infinite number of variables that may be encountered in the topography, geology and hydrology of mountain areas require individual consideration of the methods to be used in erosion and sediment control, and that no one method can be prescribed as an across-the-board best-technology approach for this purpose. Tr. 2557-2562, 2652-2654, 2667-2702.

According to the great weight of the engineering testimony, restoring slopes to original contour results in a greater amount of disturbed soil being exposed to stormwater precipitation at a steeper angle on the mountainside, and as a result the restored slope is subject to greater erosion, slippage and landslides than is the case where the mining bench area is graded to a more level contour with appropriate drainage and diversion structures, and a portion of the highwall is left. In the latter situation the rainwater runoff from upper slopes is interrupted by the reclaimed mining bench, and because the compacted fill material on the mining bench has a high water retention capacity there is less likelihood of stream sedimentation or flooding from heavy rainfall. Tr. 627-630, 633-634, 1169-1171, 1197, 1834, 2554-2555. Dr. Donald Haney, State Geologist and Director of Geological Research for the Commonwealth of Kentucky, described the experiences encountered on similar terrain

in Eastern Kentucky where the State Highway Department has been trying for 50 years to control steep angle slopes on highway cuts. He stated that the fill material cannot be stabilized, and that continual erosion, slippage and rock falls create a constant maintenance problem. Similar problems have been experienced, he said, in attempting to comply with the approximate original contour requirements of the Act on surface coal mining operations in Eastern Kentucky. In his opinion a far better environmental result is obtained by compacting the fill material on the mining bench to the extent practical, and leaving a portion of the highwall exposed. Tr. 2621-2625. Benjamin C. Green, former Deputy Director of the West Virginia Department of Natural Resources, testified that restoration of original contour creates an impossible situation from an environmental point of view because "if you take the material to the top of the wall, you blend in and complement the surrounding slopes, then you have greatly accelerated the erosion and sediment control problems, you are, of course, duty bound to prevent." Tr. 2544.

On the basis of this and similar testimony the district court reached its finding that the original contour requirement is so particularly unsuited to Virginia's terrain that compliance with its provisions has a higher potential for environmental harm than alternative methods of reclamation. J.S. App. 39a.

The Secretary argues (Brief p.48) that the district court's findings are not supported by the weight of the evidence. For this purpose he selects certain items of trial testimony which supposedly refute the trial court's findings, but which, in fact, do not. In a footnote on

page 48 of his brief the Secretary cites testimony of Ronald Hill to the effect that the statutory standards could be achieved by use of the so-called "block cut" or "haulback" method of surface mining. The district court specifically found, however, that use of this method of surface mining is not feasible in the steep mountain areas of Virginia. J.S. App. 37a, n.10; 43a, n.14. The Secretary further refers to opinion testimony of Dr. David Maneval to the effect that the steep slope requirements could be met in Virginia, but Dr. Maneval admitted that his experience was limited to surface mining in Pennsylvania where coal deposits are found on flat or gently rolling terrain totally unlike that in southwestern Virginia and other portions of central Appalachia. Tr. 1008-1014a.[22] Billy R. Loughry, whose testimony is also cited by the Secretary, agreed that surface mining in Pennsylvania is completely different so far as terrain conditions are concerned, and in his view it would be impossible to comply with the original contour requirement in the steep slope terrain in Virginia. Tr. 1822. Dr. Richard Newcomb, the government's mineral economics expert, whose testimony is also cited in the Secretary's brief, admitted on questioning by the Court that the statistical data he had compiled and discussed in his testimony was entirely theoretical and had little or no bearing on the problems encountered by Virginia surface mine operators under the Federal Act. Tr. 1343-1357.

In any event, the findings of the district court on the basis of the trial evidence should be accorded deference as provided in Rule 52 of the Federal Rules

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[22] Dr. Maneval conceded that no more than six percent of Pennsylvania coal is on slopes of 20 degrees or more, as compared with ninety-five percent in Virginia. Tr. 1008-1010.

of Civil Procedure. As stated in that Rule, "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." *See United States* v. *U.S. Gypsum Co.,* 333 U.S. 364, 393 (1948); *Kelley* v. *Southern Pacific Co.,* 419 U.S. 318 (1974). In the present case there is no basis for concluding that the findings of the district court on the environmental undesirability of restoring steep slopes to original contour are clearly erroneous.

This type of detailed, terrain-specific inquiry is almost invariably necessary when considering land use control. The flaw of the Act, therefore, lies not merely in the breadth of its scope but in the inflexible nature of the rules it imposes. Simply stated, what works in Pennsylvania does not work in Virginia.

In view of the multiplicity of uses to which land may be put, and the peculiarly local factors which may influence any particular use or value, it is difficult to state categorically that a federal interest in land use allocation as contemplated under the Act is "demonstrably greater" than the interests of state and local governments and their citizens who are most immediately affected thereby. Even if, for example, return to original contour would improve the aesthetic value of the land, it does not balance out the economic deprivations imposed upon the affected communities by loss of employment, tax revenues and other benefits derived from surface mining.

2. Land-Use Planning Is A Traditional Service Of State and Local Government And Particularly Within Their Expertise

Over one hundred years ago this Court recognized that use, sale or other disposition of land was of vital concern to the States as States.

> "The title and modes of disposition of real property within a state, whether *inter vivos* or testamentary, are not matters placed under the control of federal authority, for such control would be foreign to the purposes for which the federal government was created, and would seriously embarrass the landed interests of the state." *U.S.* v. *Fox*, 94 U.S. 315 (1876).

Both the Court in *National League of Cities* and the district court recognized that the validity of a Tenth Amendment bar to the exercise of the Commerce Clause by Congress hinges in large part on the degree to which a State, as a state, is affected. 426 U.S. at 875 and J.S. App. at 32a, respectively. As previously discussed, the lower court concluded that

> [W]hile the Act ultimately affects the coal mine operator, its pervasive effect is on the states' legislative authority and on state control of land within its boundaries. J.S. App.32a.

The district court properly ascertained that the Act *regulates* surface mining in order to achieve federal land-use *planning* goals.

Land neither moves in commerce, nor is transportable to other jurisdictions. Land-use planning has substantial effects but they are localized. Decisions about land use, moreover, should be made by those

persons who must live with their decisions, i.e., representatives of municipal, county, or state governments. Land use and planning directly affects the prosperity of their citizens, generation of tax revenues to fund basic governmental services, and the aesthetic values of the immediate environment in which they reside. It is the typical function "essential to separate and independent existence" of a state. *See, National League of Cities,* 426 at 845 *citing Coyle* v. *Oklahoma,* 221 U.S. 559, 580, and *Lane County* v. *Oregon,* 7 Wall. 71 76.

III

SECTIONS 515 AND 522 OF THE SURFACE MINING ACT CONSTITUTE A TAKING OF PROPERTY WITHOUT JUST COMPENSATION IN VIOLATION OF THE FIFTH AMENDMENT

The individual plaintiffs in this case include owners of fee interests in coal lands, as well as surface mine operators who have leased mineral rights on mountain slope acreage. The interests of these plaintiffs are tangible interests having substantial economic value. The trial evidence established that in the mountain ridges of Southwest Virginia, coal is usually found in multiple seams separated by "partings" of intervening rock and shale strata. Where these seams are mineable by surface mining methods the amount of recoverable coal per acre foot is approximately 1700 tons and, based on the average thickness of seams, the average tonnage yield per acre is from 8000 to 9000

tons. Pr. Tr. 22-23, 41.[23] At current royalty rates and market prices, the economic value which a fee owner leasing his land to a coal mine operator can derive from his mineral estate interest represents approximately $20,000 an acre. Id., 22,42. The fee owner can, in addition, realize substantial residual value as a result of the increased utility of the land *after* removal of the coal if it is reclaimed to a more level configuration appropriate for agriculture, grazing, silviculture or commerical development. Id., 23-25, Tr. 696-709. In its original state the steep slope land has no productive use for these or other purposes. J.S.App.56a.

Although predictions of profitability are always matters of speculation, the trial evidence established that the residual value of reclaimed surface mined areas after removal of the coal is dependent upon the extent to which it is left in a relatively level state. Other dependent factors include proximity to population centers and accessibility to improved public roads and highways. After careful consideration the trial court accepted as accurate the uncontroverted testimony of real estate experts from the southwestern Virginia area that reclaimed level land adjacent to highways or populated areas may command prices up to or in excess of $100,000 an acre, whereas if reclaimed to its approximate original contour "its value has been diminished to practically nothing," J.S. App.45a, Tr. 696-709, 843-844; Pr.Tr. 20-25, and it has no practical value or use. As the district court aptly observed:

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[23] "Pr.Tr." refers to the transcript of testimony at the preliminary injunction hearing before the district court.

> "This is a case in which the Surface Mining Act must be viewed in a practical sense, for it involves more than just a large diminution of land value, more than commercial impracticality. In Virginia the evidence shows that surface landowners are possessed of small tracts usually less than one-hundred acres. The requirement of return to approximate original contour amounts to a physical restriction on the removal of coal . . . Because of the nature of the land, the owner is thereby deprived of any use of his land, not only the most profitable use." J.S. App.55-56a.

The trial evidence showed that the mining equipment required for a typical surface mining operation in this area involves an investment of between one and one-half to two million dollars. Tr.377-410, 852-869, 875-881. Pr.Tr. 105-111. The additional earth moving necessary to return to original contour, if such were physically possible, would require special equipment investment of a magnitude far beyond the financial capabilities of mine operators typical of those operating on these relatively small tracts.[24]

As a result of the original contour requirements of the Act the stark reality faced by the individual plaintiffs is that no practical use can be made of their property. Far from suffering a mere "diminution" in the value of their property, plaintiffs are deprived outright of any and all reasonable use.

In concluding that the prohibitory effect of Title V effectuates a "taking" of plaintiffs' property the district

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[24] As previously noted, the district court found that return to original contour and completely covering the highwall is for all practical purposes physically impossible of attainment.

court reviewed the principals laid down by this Court in the cases beginning with *Hadacheck* v. *Sebastian,* 239 U.S. 394 (1915), *United States* v. *Cress,* 243 U.S. 316 (1917) and *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393 (1922), through *United States* v. *Causby,* 328 U.S. 256 (1946), *Goldblatt* v. *Hempstead,* 369 U.S. 590 (1962), *Penn Central Transportation Co.* v. *City of New York,* 438 U.S. 104 (1978), *Andrus* v. *Allard,* 444 U.S. 51 (1979), and *Kaiser Aetna* v. *United States,* 444 U.S. 164 (1979).

After a scholarly discussion of "The formulas and factors [which] have been developed in a variety of settings", *Allard, supra,* the district court concluded that

> "In the case now before this court the facts are on all fours with *Pennsylvania Coal Co.* v. *Mahon.* This is not a case involving 'an average reciprocity of advantage,' 260 U.S. at 415, which has been recognized as a justification for zoning and other laws . . . Because of the nature of the land, the owner is deprived of any use of his land, not only the most profitable use." J.S. App.55a.

Appellees believe that the district court properly applied the rule of *Pennsylvania Coal Co.* to the facts of this case. In making the determination that a taking had occurred, the Court in *Pennsylvania Coal* recognized the presumption of general validity which attaches to every legislative enactment, yet, according to Justice Holmes, the exercise of the police powers of the State must have its limits "or the contract and due process clauses are gone." 260 U.S. at 413. In attempting to strike a balance between the government's power to regulate for the public interest and

constitutionally protected property rights, Justice Holmes laid down the broad principle so often reiterated by this Court:

> "The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognised as a taking." Id., at 145.

The continuing force and validity of *Pennsylvania Coal* has been repeatedly acknowledged by this Court. Although there is no case more compellingly apposite to the instant case than *Pennsylvania Coal,* it is indeed curious that the Secretary's brief relegates discussion of its significance to a single footnote which, moreover, attempts to explain the holding in that case as one where the Court was "unwilling to apply general rules at the instance of private parties hoping to be excused from their bargain." Brief, 57, n.34.

The Secretary proceeds to cite *Goldblatt, supra,* for the proposition that "a taking should rarely be found where the interference arises 'from some public program adjusting the benefits and burdens of economic life to promote the common good." Brief, 54. Appellees do not quarrel with this general principle of balancing the benefits and burdens of governmental regulation, but point out that the district court here found no evidence that sections 515(d) and 522 promote the common good, and, in fact, found that their provisions do not accomplish that purpose. J.S. App.55a, n.16.

There is the further fact that an owner of land has a justifiable expectation that any determination as to the permissible use of his land will be made by the

State or local authorities who have exclusively exercised this function in the past, and that he will not be subjected to a massive body of zoning or land use regulations by a completely different governmental entity.[25] It is not unreasonable to assume that many persons who have invested in coal lands with the expectation that they could remove the coal by surface mining methods would not have made such investments had they reason to believe that they would be subjected to a pervasive scheme of land use regulations and controls such as that created by the Federal Act. The landowner plaintiffs in the present case are in substantially that type of situation, where they now find that the federal regulations frustrate their "reasonable investment-backed expectations." See *Kaiser Aetna* v. *United States,* 444 U.S. 164 (1979).

In attempting to fit this case within the framework of *Penn Central Transportation Co., supra,* the Secretary's brief ignores two important distinctions. First, the plaintiffs in *Penn Central* sought to obtain compensation for the loss in the value of their property resulting from the Landmark Law, whereas in the present case appellees have sought and obtained a declaratory judgement invalidating those portions of the Surface Mining Act which deprive them of the use

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[25] One author has described a right of procedural due process as one which requires that some legislative actions be undertaken only by a "governmental entity which is so structured and so charged as to make possible a reflective determination that the action contemplated is fair, reasonable, and not at odds with specific prohibitions in the Constitution." Note, *Insular Majorities,* 91 Harvard Law Review, 1373, 1414 (considering *Hampton* v. *Mow Sun Wong,* 426 U.S. 88 (1976)). See also, *Due Process of Lawmaking,* 55 Nebraska Law Review 197 (1976).

of their property and totally destroy its value. Second, the finding of the Court in *Penn Central* that the plaintiffs there had not been deprived of all reasonable use of their property is quite different from a case such as the present case where it was found that the Act has effectively precluded any economic use of the plaintiffs' property.

The Secretary continues to misrepresent the true impact of the Federal Act by arguing (Brief 52) that there is no "taking" under sections 515(d) and 522 because section 515(c) provides for variances from approximate original contour (an argument we have dealt with earlier in this brief), and because the prohibitions contained in section 522(e) against mining on specified lands were expressly made subject to "valid existing rights" and "do not apply to surface coal mining operations . . . which exist on the date of enactment." Brief 54. The reality is, however, that the exception for valid existing rights applies only to specific surface mining operations for which all required permits were issued prior to August 3, 1977, the effective date of the Act, and it has no applicability to the great preponderance of the lands and mineral interests of plaintiffs which were not "permitted" as of that date, and which are now subject to the restrictions imposed by the Act. Any suggestion that one who owned coal lands or mineral rights as of the date of the Act is unaffected by the section 522 restrictions is totally false. The clear intent of the language of the Act, as well as the Secretary's interpretation, is that "valid existing rights" applies only to surface mining acreage for which all permits were issued and in effect as of August 3, 1977. Except, then, for the limited parcels for which mine operators had obtained permits

before the date of the Act, the prohibitions of section 522 deny to the owner the use of his land for surface mining.

Similar efforts by the Secretary to analogize the challenged portions of the Act to other governmental regulations aimed at preventing "nuisances" cannot be seriously entertained. The Secretary's brief cites various cases which, on various "nuisance" theories, justify restrictions on property use. (See e.g. *Goldblatt* v. *Town of Hempstead, supra; Miller* v. *Schoene,* 276 U.S. 272 (1928); *Pierce Oil Corporation* v. *City of Hope,* 248 U.S. 498 (1919); *Hadacheck* v. *Sebastian, supra; Reinman* v. *City of Little Rock,* 237 U.S. 171 (1915); *Moore* v. *City of East Cleveland,* 431 U.S. 494, 513 (1977), cited at p.57 of appellant's brief). An examination of these cases provides no basis for factual analogy to the instant situation, since the challenged portions of the Act have been found by the trial court to be inconsistent with the common good of the citizens and communities in southwestern Virginia, and demonstrably unsound from an environmental standpoint. Far from constituting a nuisance, surface coal mining in southwestern Virginia must be regarded as benefiting the lives of the people. Moreover, although it was the legislative judgement of Congress that completely unregulated surface mining may have deleterious effects upon the environment and the public welfare, Congress also incorporated into its Statement of Findings and Policy the express finding that "surface mining operations . . . contribute to the economic well-being, security, and general welfare of the Nation," §101(j), and there is no suggestion in the Act that surface coal mining should be declared a nuisance.

Although in recent years this Court has shifted its emphasis in describing the elements of a taking, (see, e.g. *Andrus* v. *Allard,* 444 U.S. 51 (1979), in which the Court viewed a "taking" as "the loss of profit opportunity . . . accompanied by a physical restriction against the removal of coal" *Id.,* n.22; *Kaiser Aetna* v. *U.S.,* 444 U.S. 164 (1979), in which the Court identified factors such as "the economic impact of the regulation, its interference with reasonable investment-backed expectations and the character of the governmental action") the Court has also continued to cite *Pennsylvania Coal* with approval in these and other cases. However unable the Court may be to develop any "set formula" for determining when a taking has occurred, (*Penn Central Transportation Company, supra,*) it is clear that the "ad hoc factual inquiry" required by *Penn Central,* which was painstakingly undertaken by the district court here, has resulted in a well-substantiated determination that portions of the surface mining Act effectively take plaintiffs' property without just compensation in violation of the Fifth Amendment.

Finally, the Secretary suggests (Brief p.59) that the Tucker Act may provide an alternate basis for relief by way of compensation, but quickly adds: "One may doubt whether the jurisdictional grant in the Tucker Act was ever intended to cover taking claims arising from regulatory legislation."

The Tucker Act as an adequate remedy in cases such as this was rejected by the Court in *Duke Power Company* v. *Carolina Environmental Study Group,* 438 U.S. 59 (1978). The plaintiffs there were seeking a declaration that the Price-Anderson Act, which limits the monetary liability of electric utility companies for

nuclear accidents, could result in widespread property losses without adequate compensation, and thus contravened the Fifth Amendment. The Court held that the plaintiffs had stated a proper cause of action under 28 USC 1331, and rejected the contention that their "taking" claim could only be adjudicated in the Court of Claims under the Tucker Act. In commenting on this point the Court stated:

> "Mr. Justice Rehnquist suggests that appellees' taking claim will not support jurisdiction under section 1331(a), but instead that such claims can only be adjudicated under the Tucker Act, 28 USC 1491. We disagree. Appellees are not seeking compensation for a taking, a claim properly brought in the Court of Claims, but are now requesting a declaratory judgement that since the Price-Anderson Act does not provide advance assurance of adequate compensation in the event of a taking it is unconstitutional . . . While the Declaratory Judgement Act does not expand our jurisdiction, it expands the scope of available remedies. Here it allows individuals threatened with a taking to seek a declaration of the constitutionality of the disputed governmental action before potentially uncompensable damages are sustained." 438 U.S. at 71, n.15.

Appellees here are seeking a declaratory judgement action before potentially uncompensable damages are sustained. In such event the question concerning the availability of the Tucker Act as a remedy becomes irrelevant, since the Tucker Act affords neither adequate compensation nor the precise relief to which appellees are entitled.

IV

THE DISTRICT COURT CORRECTLY ENJOINED THE ISSUANCE OF SUMMARY CESSATION ORDERS UNDER SECTION 521 (a) (2) OF THE ACT AND THE PREPAYMENT OF PENALTIES UNDER SECTION 518 ON THE GROUND THAT THEY VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

The Secretary's attack (Brief 62) upon the district court's decision on this issue is grievously inaccurate. The Secretary states that plaintiffs at trial neither alleged nor showed that any of them received a summary cessation order or suffered any loss as a result of any such orders. This statement is intended to support the Secretary's argument that no case or controversy exists, and that as a result the district court's decision was somehow premature.

The district court's Memorandum Opinion, as well as the record, directly refutes this assertion. The district court expressly found that three cessation orders were issued to Paramont Mining Corporation, one of the plaintiffs herein, and were later vacated as improper. It also found that the company sustained substantial losses as a result. (J.S. App. 65a-66a). Based on these and other similar examples the district court concluded:

> "The evidence shows that in enforcing the law, OSM inspectors have issued unjustified and arbitrary cessation orders causing irreparable harm to the mining companies." *Id.* at 65a.

and

"The court considered the evidence regarding the enforcement procedures used by the OSM inspectors to be shocking . . . ." *Id.* at 70a.

As a result of these findings, all of which are adequately supported by the evidence, the district court quite properly found that the application of Section 521 (a) (2) of the Act violates the due process clause of the Fifth Amendment because it allows federal inspectors to summarily close down a mining operation without proper cause and prior to any opportunity for a hearing.

The Secretary argues (Brief 62-63) that a prior hearing is not necessary, and cites a number of decisions of this Court. The district court considered most of the same cases (J.S. App. 63a-64a) and properly found them not controlling. Suffice it to say that none of those decisions sanctions a remedy so severe and so subjectively enforced as the case at hand.

The Secretary relies much upon *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950), a case which involved multiple seizures of misbranded food supplements under Section 304 of the Food, Drug and Cosmetic Act, 21 USC 334. This Court rejected a due process challenge to the constitutionality of the procedures employed, even though a preliminary administrative determination of probable cause was made by the agency without any opportunity for the owner of the goods to have a hearing.

The Ewing case is factually distinguishable from the instant case. The administrative determination there appears to have been made at the highest level of the agency, and the preliminary agency action was

further reviewed by the office of the United States Attorney General. Only then, was the actual decision made to file a series of libels against the products involved.

While the Court in *Ewing* did state that a hearing to protect property rights is not always required before summary governmental action is taken, neither that case nor any of the others cited by the Secretary stands for the proposition he is urging upon this Court. He asks the Court to ignore the detailed findings of the district court regarding widespread abuses of power by his own agents. He quotes from *Ewing* (Brief 63) to buttress his statutory authority, in total disregard of the injuries judicially determined to have been brought about by his representatives. If an inspector employed by the Secretary can—as many have—shut down a mine and thereby cause severe financial loss, and unemployment, either upon a whim or in error, then the Secretary has successfully overturned the rule stated by this Court only four years ago that:

> "The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardship of a criminal conviction, is a principle basic to our society . . . The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'." *Mathews* v. *Eldridge*, 424 U.S. 319 (1976) at 333, citing *Joint Anti-Fascist Comm.* v. *McGrath*, 341 U.S. 123 (1951). (Frankfurter, J. concurring.)

Surely this is the key to the instant case. The district court has required the Secretary to give a mine operator a hearing at a meaningful time and in a

meaningful manner. Because a summary cessation order can be the equivalent of an economic death sentence for a small mine operator, a hearing held before that sentence is carried out is the only one that is truly meaningful. Rather than accept the Secretary's suggestion to allow him unfettered power, this Court should uphold the eminently reasonable and modest constraints upon that power imposed by the district court. See also *Goldberg,* v. *Kelly,* 397 U.S. 254 (1970), where this Court, consistent with the views expressed in *Mathews,* held that due process requires an evidentiary hearing prior to even a temporary cessation of governmental economic benefits, since such action could deprive an eligible person of his very means of existence. *Id.* at 264. The analogy to the present case is clear because—as the district court found—a cessation order can deprive a mine operator and his employees of their means of existence.

In ruling on this issue the district court cited and followed the rule laid down by this Court in *Mathews* v. *Eldridge, supra,* where the Court stated:

> ". . . identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. at 335.

In the present case, there can be no question that the private interests involved are substantial. As already noted, not only has the issuance of cessation orders been determined by the district court to cause significant monetary losses to mine operators, and loss of work to their employees, but such orders have had the effect of driving mining companies completely out of business. J.S. App.69a-70a. See, *Pennsylvania Coal Co.* v. *Mahon, supra; R.A. Holhman and Co.* v. *SEC,* 299 F.2d 127 (D.C. Cir.), *cert denied,* 370 U.S. 911 (1970).

The second factor to be considered under *Mathews*, the risk of erroneous deprivations, is also present here. As previously stated, the evidence before the district court described specific instances in which cessation orders were issued in an arbitrary and capricious manner. At trial the Secretary was unable to show even one instance in which the issuance of a cessation order was found to be necessary to protect public health and safety or the environment. The lack of objective criteria to guide the Secretary's inspectors requires them to make and implement purely subjective decisions.[26] Where there are no quantifiable guidelines upon which to base a summary deprivation of property, *Mitchell* v. *W.T. Grant Co.* 416 U.S. 600 (1974), where there is no provision for prior input by

[26] The Secretary relies (Brief 65) on *Sink* v. *Morton,* 529 F.2d 601 (4th Cir. 1975) to support the constitutionality of summary enforcement provisions. However, the enforcement provisions of the Federal Coal Mine Health and Safety Act of 1969 there at issue authorize summary withdrawal orders only where the inspector finds that an "imminent danger" to the lives and safety of the miners in underground mines exists. This is a quite different type of situation than one involving possible environmental harm under the Surface Mining Act.

the operator, *Montrym* v. *Panora,* 429 F.Supp. 393 (D.Mass. 1977), and where the governmental action will effectively paralyze the operation of a business and drive its operator to the wall, *United States* v. *Vertol,* 545 F.2d 648, 651 (9th Cir. 1976), such a property deprivation has not been accomplished with due process of law. Moreover, where the loss cannot be compensated, the private interest is of such a magnitude that a pre-hearing taking can rarely be justified. *Stanley* v. *Illinois,* 405 U.S. 646 (1972); *Stypmann* v. *City and County of San Francisco,* 577 F.2d 1338 (9th Cir. 1977). The existence of each of these factors in the present case amply demonstrates that the second element of the *Mathews* test has been met.

Finally, *Mathews* requires that the governmental interest in question be considered in light of the fiscal or administrative burdens that other procedural requirements would entail. This does not negate other considerations, but does require the court to balance the competing interests. Generally, a taking without a prior hearing to advance a valid government purpose can be justified only in extraordinary circumstances. *Fuentes* v. *Shevin,* 407 U.S. 67 (1972). Where reasonable alternative means exist, they should be used. *Vlandis* v. *Klein,* 412 U.S. 441 (1973).

The Act has not involved such a large number of summary cessation order cases as would unduly burden the regulatory authority. Thus, unlike the situation in *Mathews,* the Secretary would not be confronted with a massive and excessively expensive task if he were required, as the district court directed, to afford mine operators a hearing prior to issuance of a cessation order. Moreover, in similar circumstances,

other federal agencies dealing with matters of safety, health and environmental protection have been able to function quite adequately with presanction hearing requirements. See Federal Water Pollution Control Act of 1972, 33 U.S.C. 1364; Occupational Safety and Health Act, 29 U.S.C. 662. Similar procedures, such as those required by the district court, will adequately protect the governmental interest asserted under the Act.

Section 518(c) of the Act also denies mine operators due process of law because it requires an operator who desires to contest a civil penalty assessment to place in escrow with the Secretary the amount of the assessed penalty in order to obtain any administrative or judicial review of the alleged violation or the penalty being proposed therefor. The district court was not confused, as suggested by the Secretary (Brief 69), with respect to the nature *and the impact or effect* of the prepayment requirement. On the contrary, the district court recognized that the "refund-with-interest" provision does not adequately protect operators because it ties up needed capital and can have the practical effect of a cessation order. J.S. App.69a-70a.[27] The district court understood only too well that this procedure can be and has been used to pressure operators to submit to unjustified orders of federal inspectors in order to avoid tying up scarce resources. See, *Star Coal Co.* v. *Andrus* No. 79-171-2 (S.D. Iowa Feb. 13, 1980), and *Indiana* v. *Andrus,* Nos. IP78-500-C and IP78-501-C (S.D. Ind. June 10, 1980),

[27] The Secretary has characteristically ignored these findings of the district court when he asserts that prepayment does not impose "significant burdens on mine operators" because interest on the prepaid penalty protects mine operators against financial injury. (Brief 70).

appeal pending No. 80-231, wherein two other district courts have reached similar conclusions.

Once again, the Secretary (Brief 67-69) has attempted to confuse the manner in which Section 518 and its implementing regulations operate. The Secretary states that a hearing is provided under his regulations with respect to the fact of violation without prepayment of penalty, but he admits that the hearing cannot involve a contest of the *amount* of the penalty unless the assessed amount is prepaid. Such distinction is of little practical use to a small or medium sized mine operator whose limited capital can be tied up for a considerable time without a complete hearing.

Appellees have been unable to discover any precedent for such a requirement and the Secretary has cited none. Clearly, the Act is not a revenue-producing statute. That being the case, no substantial public purpose is served either by statutory or administrative requirements which deny operators a full and complete hearing before being required to pay penalties.

CONCLUSION

The questions presented here are constitutional questions of great magnitude. If the Commerce Clause is now construed to give the federal government the power to dictate the terms and conditions under which the States may permit land to be used for surface coal mining it is inevitable that similar justification will be made for extending the reach of that power to other categories of land use until virtually all State land use powers are preempted. In a real sense this case presents the ultimate test of the principles of Federalism, and the continuing role of the States as sovereign entities.

Respectfully submitted,

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